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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

94-NC-157

W

BEAR LAKE WATCH, INC.; EMERALD
BEACH, INC.; BEAR LAKE EAST INC.;

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS;
WILLIAM J. PERRY, Secretary of
Defense; U.S. ENVIRONMENTAL
PROTECTION AGENCY; and CAROL M.
BROWNER, Administrator of the
Environmental Protection Agency;

Defendants.

Civil Action No. ____

COMPLAINT FOR
DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF

INTRODUCTION

1. This is a citizen's suit under Section 505(a) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. § 1365(a), challenging the failure of the United States Environmental Protection Agency (the "EPA"), and the United States Army Corps of Engineers (the "Corps"), to perform non-discretionary duties under the CWA, 33 U.S.C. §§ 1251 to 1387, with regard to the dredging, and consequent four foot drop in water levels, at Bear Lake, Utah.
2. Specifically, the Secretary of the Army, acting through the Corps, has violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, by explicitly determining that the dredging and considerable lowering of Bear Lake could proceed in the absence of a Clean Water Act "dredge and fill" permit. The Administrator of the EPA, with "final authority" to prohibit the discharge of dredged or fill material, has consented to the unlawful discharge. The Corps has also violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 to 4370(b), by failing to prepare an environmental impact statement on the dredging, which, through its effects on property values, business and recreational interests, will have a significant impact upon the human environment.
3. As a result of the Corps and EPA actions, Bear Lake, which has undergone alarming water level declines over the last decade, will be further emptied without proceeding through the "dredge and fill" permitting process, and without the requisite analyses under NEPA.
4. This complaint arises under and alleges violations of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251 to 1387, the

regulations promulgated thereunder, 33 C.F.R. §§ 323 to 338, and the National Environmental Policy Act, 42 U.S.C. § 4321 to 4370(b), and the regulations promulgated thereunder, 40 C.F.R §§ 1500 to 1517 (Council on Environmental Quality) and 33 C.F.R. § 230 (Army Corps of Engineers). This complaint also arises under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (D).

JURISDICTION AND VENUE

5. On June 17, 1994, Plaintiffs served upon Defendants a notice of their intent to file this action, pursuant to 33 U.S.C. § 1365(b). More than sixty days have elapsed since the filing of this notice. A copy of the notice letter is attached as Exhibit 1.

6. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question); 33 U.S.C. § 1365(a) (Clean Water Act); 28 U.S.C. § 1346(a)(2) (civil action against the United States); and 28 U.S.C. § 1361 (mandamus).

7. This court may order performance of duties under the Clean Water Act pursuant to 33 U.S.C. § 1365(a), issue a permanent injunction pursuant to 28 U.S.C. § 2202(a) (injunctive relief) and order further relief pursuant to 28 U.S.C. § 2201 (declaratory relief). There is a real and present controversy between the parties.

8. Venue lies in this judicial district under 28 U.S.C. § 1391(e)(1) and/or (2) because a substantial part of Bear Lake and the property impacted by the proposed dredging rests in Utah, and because Plaintiff(s) and a majority of Plaintiffs' members reside in Utah.

PARTIES

9. Plaintiff Bear Lake Watch, Inc. is a Utah nonprofit corporation which was organized in 1994 to protect and restore the environment and waters of Bear Lake. Bear Lake Watch is seeking to assure that the public interest is served when decisions are made to determine the allocation and utilization of Bear Lake's water. Olsen Aff., ¶ 4.

10. Emerald Beach, Inc. is a non-profit corporation organized by Utah residents in 1972 and consisting of homeowners owning 26 separate lots in the Emerald Beach subdivision. Each of the 26 lots contains ten acres with 500 feet of frontage along Bear Lake. Members are interested in the protection of Bear Lake and their property interests along the Lake.

11. Bear Lake East, Inc. (previously Bear Lake Sands subdivision), is a non-profit corporation consisting of 56 property owners, the majority of whom reside in Utah. The corporation owns 70 lots (approximately one-quarter acre each), about ten acres of which front directly on Bear Lake. The membership is concerned about the water levels and water quality of Bear Lake, and the impact which lower water levels may have on property values and access to recreational activities.

12. The approximately 150 members of Bear Lake Watch, the homeowners of Emerald Beach, and the 56 property owners of Bear Lake East live and/or have businesses around Bear Lake. Many have been directly and negatively impacted by Defendants' lack of compliance with the Clean Water Act and NEPA in authorizing dredging activities at Bear Lake. Further lowering of

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the Lake will mean lower property values (Olsen Aff., ¶ 7), reduced fishing opportunities (Olsen Aff., ¶ 8), additional boating problems (Olsen Aff., ¶ 9), and reduced business revenues derived from the tourists who flock to a stable and healthy lake environment but stay away from a marshy and mosquito infested waterfront (Mattson Aff., ¶¶ 6 and 8).

13. The proposed dredging activities will be modified, conditioned, and/or halted if the Corps subjects the proposed dredging to the Section 404 and NEPA processes, thereby preserving the property values and recreational interests of Plaintiffs' members. Compliance with the NEPA process will also protect Plaintiffs' informational interests. Olsen Aff., ¶ 11; Mattson Aff., ¶ 9.

14. The interests of Plaintiffs' members (home and small business owners) are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by the failure of Defendants to comply with NEPA and the Clean Water Act, as more fully set forth below. Plaintiffs have no adequate remedy at law.

15. Defendant Corps is legally charged with responsibility for administering Section 404 of the Clean Water Act (33 U.S.C. § 1344) concerning the issuance of permits for the discharge of dredged or fill material in navigable waters. The Corps' administration of its Section 404 permit program must be consistent with the other provisions of the Clean Water Act and the Act's central purpose of prohibiting discharges into waters of the United States except by permit.

16. Defendant William J. Perry is sued in his official capacity as the Secretary of the United States Department of the Defense, with its headquarters in Washington, D.C. The Secretary of the Defense is the federal official vested with responsibility for administering Section 404 of the Clean Water Act.

17. Defendant EPA is legally charged with administering the Clean Water Act, and shares joint responsibility with the Corps for administering Section 404. Even under Section 404, EPA retains "final authority" to prohibit discharges. The EPA also develops guidelines which apply to the disposal of § 404 dredged or fill materials.

18. Defendant Carol M. Browner is sued in her official capacity as the Administrator of the EPA with its headquarters in Washington, D.C. The EPA Administrator is the federal official vested with responsibility for administering the Clean Water Act.

FACTS

19. Bear Lake is a natural body of water situated in the Wasatch Mountain basin, slightly more than half of which is located in Utah and the rest in Idaho. Its surface area of 109 square miles stretches about 20 miles north and south, and about seven miles across.

20. In 1909, a Utah Power & Light (UP&L) predecessor company (the Telluride Power Co.) began constructing facilities to divert Bear River into Bear Lake. Its general manager, L.L. Nunn, a pioneer in hydroelectricity, was searching for more electricity to serve Utah's mining industry. The Bear River

below Bear Lake, despite its meandering, was viewed by proponents of the hydroelectric project as a virtual waterfall. As noted by UP&L literature:

And what a waterfall! The difference in elevation between Bear Lake and the Great Salt Lake is about a third of a mile -- a plunge that dwarfs Niagara Falls."

21. By 1918, the Bear River diversion project, which by then had come under the ownership of Utah Power & Light (UP&L), was completed. It involved the digging of a channel (the Rainbow Canal) to divert water from "upper" Bear River into Bear Lake. The St. Charles/Lifton Pumping Plant (the "Lifton Pumping Plant") was built to pump water from Bear Lake into "lower" Bear River via an outlet canal.

22. The second phase of UP&L's project involved the construction of hydroelectric plants in the "lower" Bear River downstream from Bear Lake. Beginning with the Grace Hydroelectric Plant in 1905 and ending with the Cutler Plant in 1927, UP&L built or purchased six hydroelectric plants¹ with an installed capacity of almost 116 megawatts and the capability of generating 400,000 mwh of energy annually. At an average kilowatt hour of electricity valued at \$.06, such generating capacity is worth \$24 million dollars annually. Decision Document for Army Permit No. 920301450 (authorizing dredging under Section 10 of the Rivers and Harbors Act), April 19, 1993 at 4-5 (the "Decision Document"), attached as Exhibit 2.

¹ UP&L's six hydro plants are Soda, Last Chance, Grace, Cove, Oneida, and Cutler.

23. In order to make water available to its hydroelectric plants below Bear Lake, UP&L entered into a series of contracts, beginning on or around December 30, 1919 and continuing into the present decade, whereby UP&L obtained water rights (and benefits) from canal and irrigation companies in return for UP&L's agreement to release and provide water from Bear Lake, when available, to these same companies.² In one case, UP&L entered into a contract obligating an irrigation company to buy all its electricity from UP&L in return for UP&L's agreement to provide the irrigation company with available water.³ Without the irrigators' contracts, the viability of UP&L's Bear Lake/River hydroelectric project would have been significantly diminished.

24. Hence, the transformation of Bear Lake, the construction and purchase of six downstream hydroelectric plants, and the contracts with downstream canal and irrigation companies all furthered UP&L's designs of trapping the energy-making potential of the lower Bear River and selling off the resulting electricity.

² See Conveyance and Agreement dated Dec. 30, 1912 between UP&L and Utah-Idaho Sugar Company, ¶¶ III(a) and IV(a); Agreement dated June 19, 1919 between UP&L and West Cache Irrigation Company, ¶¶ 7 and 8; Agreement of Purchase & Sale dated January 19, 1984 between UP&L and Last Chance Hydroelectric Company, ¶¶ 3(g) and 4(a); Second Amendatory Agreement between PacifiCorp and Last Chance Canal Company dated July 2, 1990, ¶¶ 4(a)(1), attached as Exhibit 3.

³ Contract dated April 3, 1916 between UP&L and Lewiston-Bear Lake Irrigation Company, ¶¶ 2 and 4, attached as Exhibit 4.

25. The Lifton Pumping Plant is effectively the linchpin of the hydroelectric project, since it allows UP&L to regulate the flow of water out of Bear Lake.

REGULATORY HISTORY

26. On December 19, 1978, the Corps issued to UP&L a permit under Section 10 of the Rivers and Harbors Act (Permit No. 1) to "maintain channel capacity" by dredging up to 80,000 cubic yards of materials over a ten year period in a 2500' channel within Bear Lake leading to the Lifton Pumping Plant.

27. On June 30, 1988, the Corps issued to UP&L another ten year permit for "maintenance dredging" of the same channel (Permit No. 2). UP&L was authorized to dredge the same amount of spoils (80,000 cu. yds.) over the life of the permit. Permit Nos. 1 and 2 authorized dredging using a floating auger with an hydraulic pump.

28. Ostensibly under its Permit No. 2, UP&L, in August, 1992, conducted dragline excavation operations which enlarged and extended to 3000' the channel to the Lifton Pumping Station. In the process, UP&L violated Idaho Water Quality Standards at least twenty (20) times by discharging quantities of sediment that impaired the beneficial uses of Bear River, downstream of Bear Lake.

Exhibit 5. UP&L used a drag line, and, in violation of its permit, delivered to the Bear River via the outlet canal between 9,520 and 28,560 tons of sediment. Id. As a result of the exceedences of Idaho water quality standards, UP&L entered into a consent order with the Idaho Department of Health and Welfare requiring,

among other things, UP&L's payment of \$20,000 for water quality improvements in the Bear River watershed. Exhibit 6.

29. On November 18, 1992, UP&L applied for a new permit (Permit No. 3) to extend its, by then, 3000' channel by an additional 2000', and, in the process, remove 74,000 cubic yards of spoils. Exhibit 7.

30. During the Corps' permitting process for Permit No. 3, L.R. ("Dick") Strong, a director and member of Bear Lake Watch, Inc., repeatedly urged the Corps to conduct "a careful study" and an "environmental impact study" because of the impact of further water level reductions on his approximately 275 feet of Lake front property. Exhibit 8.

31. On April 6, 1993, prior to the issuance of Permit No. 3, Donrey Ecrist, a member of Plaintiff Bear Lake Watch, Inc., discussed the need for, and asked the Corps to require, a Section 404 permit. Exhibit 9.

32. On May 12, 1993, the Corps issued Permit No. 3 to UP&L (since required by PacifiCorp). The environmental assessment accompanying Permit No. 3 found that the dredging would result in no significant impact on the quality of the human environment. Decision Document, Exhibit 2. It also incorporated the Corps' decision to entirely exempt the proposed dredging from CWA § 404 permitting, based on an exemption provided for the "[c]onstruction and maintenance of ... irrigation ditches." 33 C.F.R. § 323.4(a)(3).

33. UP&L and PacifiCorp do not own, operate or construct irrigation canals in connection with Bear Lake.

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EXHIBITS

34. The dredging will make possible the transfer of additional water from Bear Lake to the Bear River below the Lake, where the water will pass through six PacifiCorp hydroelectric plants on its way to the Great Salt Lake. Defendant Corps has estimated that 40,000 megawatts of power will be gained by each one foot drop of elevation on the Lake, resulting in the generation of an additional \$9.6 million in revenues for PacifiCorp should the Lake be lowered the entire four feet authorized by the Corps.

35. While Permits 1 and 2 anticipated primarily maintenance dredging, Permit No. 3 allows UP&L to draw down the surface elevation of Bear Lake to 5902' MSL, or four feet lower than is currently possible. Such a drawdown would expose an additional 2,120 acres of lakeshore, which would pull the water back in some places an additional one-quarter mile from Plaintiffs members' homes, docks and boat ramps. Olsen Aff., ¶ 6; Mattson Aff., ¶ 7.

36. In addition to a floating auger, dredging by drag line was specifically authorized in Permit No. 3. Drag line dredging stirs up large amounts of sediment. The proposed dredging at the Lifton Pumping Station will redeposit significant amounts of sediment in Bear Lake and the "lower" Bear River. As noted, UP&L was cited by the State of Idaho for its previous drag line dredging operation at the Lifton Pumping Plant because it redeposited up to 28,560 tons of sediment in the "lower" Bear River. ¶ 28, supra.

37. The proposed dredging project will also involve the depositing of excavated spoils at two sites on the exposed lakebed adjacent to the dredging. Each of the sites is located below the ordinary high water line of Bear Lake, in

navigable waters of the United States. No Section 404 permit was granted, or required, by the Corps for the depositing of spoils on these sites.

FIRST CLAIM FOR RELIEF

(VIOLATION OF THE CLEAN WATER ACT)

38. Plaintiffs hereby incorporate by reference the allegations of paragraphs one through 37 above.

39. The Federal Water Pollution Control Act (Clean Water Act or CWA) makes unlawful the discharge of any pollutant except in compliance with the provisions thereof. 33 U.S.C. § 1311.

40. The term pollutant includes "dredged spoil, ... rock, [and] sand...." 33 U.S.C. § 1362(6).

41. The discharge of dredged or fill material into navigable waters is regulated by Section 404 of the Clean Water Act. 33 U.S.C. § 1344.

42. Section 404 of the Clean Water Act authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material only after notice and the opportunity for public hearings. 33 U.S.C. § 1344(a).

43. Section 404 of the Act also requires the State of Idaho and/or Utah to certify that any discharge will comply with state water quality standards and other Clean Water Act limitations and standards. 33 U.S.C. § 1341; 33 C.F.R. § 336.1(8).

44. In addition, Section 404 of the Clean Water Act authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material

only if consistent with guidelines established by the Administrator of the U.S. Environmental Protection Agency (EPA). 33 U.S.C. § 1344(b)(1).

45. These guidelines insure that no unacceptable adverse impact on the aquatic ecosystem will result from the discharge. 33 U.S.C. § 1344(a) and (b); 40 C.F.R. Part 230.

46. The guidelines also insure that no permit will be issued unless measures to offset unavoidable impacts (i.e., mitigation measures) have been required. 40 C.F.R. § 230.10(d); Memorandum of Agreement between EPA and the Corps Concerning the Determination of Mitigation under the CWA Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990) (not codified).

47. Under Permit No. 3 (under the Rivers and Harbors Act), the Corps authorized a discharge without a Clean Water Act permit, without notice, without public hearings, without a Idaho water quality certification, and without conforming to EPA guidelines.

48. The EPA also has authority under provisions of the Clean Water Act regarding unauthorized discharges of dredged or fill material into waters of the United States. The EPA may prohibit the discharge of dredged or fill material otherwise approved by the Secretary of the Army pursuant to statute and under a Memorandum of Agreement (MOA) between the Army and EPA allocating "final authority" to EPA. 33 U.S.C. § 1344(c); 33 C.F.R. § 336.1(5).

49. Through its consent to dredging under Permit No. 3 (under the Rivers and Harbors Act), the EPA has authorized an unlawful discharge under the Clean Water Act.

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EVIDENCE

50. By authorizing and consenting to dredging under Permit No. 3, Defendants are in violation of 42 U.S.C. §§ 1311 and 1344 of the CWA, and its implementing regulations.

51. The Corps' decision to exempt the project from CWA permitting requirements was arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

(VIOLATION OF NEPA)

52. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 51 above.

53. The National Environmental Policy Act (NEPA) requires each federal agency to prepare and circulate for public review and comment a detailed environmental impact statement (EIS) on "major federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332(2)(C). The regulations have further defined this to mean that an EIS must be prepared prior to any major federal action that may have a significant effect on the environment. 40 C.F.R. §§ 1502.5, 1508.18.

54. When a federal agency is not certain whether an EIS must be prepared, the agency must prepare an environmental assessment (EA) to serve as the basis for determining whether an EIS must be prepared. 40 C.F.R. §§ 1501.3, 1501.4, 1501.9; 33 C.F.R. § 230.10.

55. An EA must include a discussion of the need for the proposed action and an examination and comparison of the environmental impacts associated with the proposed action and the alternatives to that action. 40 C.F.R. § 1508.9; 33 C.F.R § 230.10(b). An EA leads either to a decision to prepare an EIS, or a Finding of No Significant Impact (FONSI) and a decision on the proposed action. 40 C.F.R. § 1501.4(c)-(e); 33 C.F.R. § 230.11.

56. Under NEPA, agencies must:

Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses.

40 C.F.R. § 1501.2(b).

57. The Corps' EA was required to provide sufficient information on the "potential environmental effects of the proposed action" to let the Corps determine whether to prepare an EIS or a FONSI. 33 C.F.R. § 230.10(a).

The National Environmental Policy Act (NEPA) requires each federal agency to prepare and circulate for public review and comment a detailed environmental impact statement (EIS) on "major federal actions significantly affecting the quality of the human environment"

58. The Corps' EA was required to include a "discussion ... of [the project's] environmental impacts" which must be made available to the "concerned public." 33 C.F.R. §§ 230.10(b), 230.11.

59. In its EA, the Corps failed to identify and discuss the significant economic and private property impacts of lower Bear Lake water levels on the homeowners in, and visitors to, the Bear Lake region, nor did it provide a rational

basis for concluding that the dredging would result in no significant environmental effect on Plaintiffs' recreational interests. Olsen Aff., ¶¶ 6-11; Mattson Aff. ¶¶ 6-8.

60. The failure to identify and discuss the significant environmental impacts violates the Corps' duties under NEPA. 33 C.F.R. §§ 230.10 (a) and (b), 230.11. It undermines the purposes of NEPA. 40 C.F.R. § 1501.1(d). It also makes it impossible to adequately determine if the project has a significant impact upon the environment. 33 C.F.R. § 230.10(a). The Corps bears an especially heavy burden of demonstrating why the project will have no significant impacts since the proposed activity is one which would normally require an EIS. See 40 C.F.R. § 230.6(c) (concerning major changes in operation and/or maintenance of completed projects).

61. The Corps violated NEPA when it determined that the project would have no significant impact upon the human environment without 1) identifying and discussing the economic and private property impacts of lower Bear Lake water levels on the homeowners in, and visitors to, the Bear Lake region, and 2) by concluding, without a rational basis, that the dredging would result in no significant environmental effect on Plaintiffs' recreational interests.

62. The Corps' decision to authorize dredging was therefore arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

(INJUNCTION)

63. Plaintiffs hereby incorporate by reference the allegations of paragraphs one through 62 above.

64. Defendants have violated, and continue to act in violation of, the Clean Water Act and NEPA.

65. Plaintiffs and their members will be irreparably harmed if the proposed dredging is allowed to proceed in the absence of lawful procedures mandated by the Clean Water Act and NEPA.

66. Defendants will suffer little, if any, harm by being compelled to comply with procedures mandated by law.

67. Accordingly, preliminary and permanent injunctive relief should be afforded to Plaintiffs to halt dredging until Defendants comply with the Clean Water Act and NEPA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray:

1. For a judgment declaring that the Corps has violated the Clean Water Act by authorizing the dredging of a 2000 foot channel in Bear Lake in the absence of a Clean Water Act "dredge and fill" permit.

2. For a judgment declaring that the EPA has violated the Clean Water Act by consenting to the proposed discharge in the absence of a Clean Water Act "dredge and fill" permit.

3. For a judgment declaring that the Corps has violated and continues to violate NEPA by refusing to identify and discuss the significant environmental issues associated with the proposed dredging thereby making it impossible to adequately determine if the project has a significant impact upon the environment.

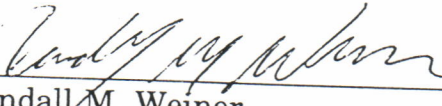
4. For a preliminary and permanent injunction requiring the Corps to revoke Permit No. 3 until a Clean Water Act "dredge and fill" permit for the proposed dredging project is obtained, and until the Corps has prepared environmental documentation in accordance with NEPA.

5. For costs of suit herein, including reasonable attorneys' fees.

6. For such other and further relief as the Court may deem just and proper.

DATED this 8th day of December, 1994.

Respectfully submitted,


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